No. 96-738

(5)

Supreme Court, U.S.
FILED
APR 10 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

JOSHUA L. DRATEL
(Counsel of Record)
JOSHUA L. DRATEL, P.C.
14 Wall Street, 28th Floor
New York, New York 10005
(212) 732-0707

Of Counsel
LISA KEMLER
ZWERLING & KEMLER, P.C.
108 N. Alfred Street
P.O. Box 20900
Alexandria, VA 22313
703-684-8000

RICHARD A. GREENBERG
NEWMAN & SCHWARTZ
950 Third Avenue
New York, New York 10022

Counsel for Amicus National Association of Criminal Defense Lawyers

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

39 pp

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Interest of *Amicus Curiae* 1

Statement 2

Summary of Argument 2

Argument

I. THE COURT BELOW ERRED IN HOLDING THAT A CONSPIRACY TO VIOLATE RICO DOES NOT REQUIRE PROOF THAT A DEFENDANT AGREED TO COMMIT PERSONALLY TWO PREDICATE ACTS OF RACKETEERING 5

A. The RICO Conspiracy Jury Instruction Below Was Erroneous Even Under the Fifth Circuit's Standard 7

B. The Pertinent Sections of RICO 8

C. Since a §1962(c) Violation Requires the Personal Commission of Two Predicate Acts of Racketeering, a RICO Conspiracy Requires An Agreement to Commit Personally Two Such Predicate Acts of Racketeering 9

D. Not Requiring a Defendant's Agreement to Personally Commit the Predicate Offenses Undermines a Series of This Court's Decisions Interpreting RICO 18

1. The "Pattern of Racketeering" Element 19

2. The "Operation or Management" Test 20

3. The "Enterprise" Element Independent of the "Pattern of Racketeering Activity" 21

II. AS APPLIED IN THIS CASE, 18 U.S.C. §666 IS AN UNCONSTITUTIONAL INTRUSION INTO LOCAL MATTERS, IN VIOLATION OF PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND INHERENT IN THE STRUCTURE OF THE CONSTITUTION 23

Conclusion 30

TABLE OF AUTHORITIES

CASES

Adams v. United States, 474 U.S. 971 (1985) 6, 18

Braverman v. United States, 317 U.S. 99 (1942) ... 10

Dooley v. United Technologies Corp., 803 F. Supp. 428 (D.D.C. 1992) 5, 11

F.C.C. v. League of Women Voters, 468 U.S. 364 (1984) 28

Fry v. United States, 421 U.S. 542 (1975) 25

H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989) 13, 19

Holmes v. S.I.P.C., 503 U.S. 258 (1992) 12, 21

Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) 26

Linder v. United States, 268 U.S. 5 (1925) 28

Nevada v. Hall, 440 U.S. 410 (1979) 24

Procunier v. Martinez, 405 U.S. 319 (1972) 26

R.E. DavisChemical Corp v. Nalco Chemical Co., 757 F. Supp. 1499 (N.D. Ill. 1990) 11

Reves v. Ernst & Young, 507 U.S. 170 (1993) 13, 20

Robinson v. California, 370 U.S. 660 (1962) 22

Rust v. Sullivan, 500 U.S. 173 (1991) 24

Sedima, S.P.R.L. v. Imrex Company, Inc., 473 U.S. 479 (1985) 9

United States v. Barton, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981) 15

United States v. Blinder, 10 F. 3d 1468 (9th Cir. 1993) 5, 6

United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) 15

United States v. Butler, 297 U.S. 1 (1936) 28

United States v. Carter, 721 F.2d 1514 (11th Cir.), *cert. denied sub nom. Morris v. United States*, 469 U.S. 819 (1984) 16, 17

United States v. Coia, 719 F.2d 1120 (11th Cir. 1983) 15

United States v. Coyne, 4 F.3d 484 (2d Cir. 1993) 27

United States v. Dransfield, 913 F. Supp. 702 (E.D.N.Y.), *aff'd*, 104 F.3d 350 (2d Cir. 1996) 29

United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) 6, 11, 12 13, 20

United States v. Foley, 73 F.3d 484 (2d Cir. 1996) ... 23, 27

United States v. Frega, 933 F. Supp. 1536 (S.D. Cal. 1996) 23, 27

United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988) 5, 13

United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624 (1995) 26, 27

United States v. Marmolejo, 89 F. 3d 1185 (5th Cir. 1996) 7, 9, 14, 15, 23

United States v. Martino, 648 F.2d 367, 400 (5th Cir. 1981) 13

United States v. Neapolitan, 791 F.2d 489 (7th Cir.), *cert.denied*, 479 U.S. 939 (1986) 5, 6, 9 10, 14, 17, 18

United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982) 10, 11, 12, 13, 14, 17

United States v. Pryba, 900 F.2d 748 (4th Cir. 1989), *cert. denied*, 498 U.S. 924 (1990) 5

United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *cert denied*, 500 U.S. 915 (1991) 5

United States v. Quintanilla, 2 F.3d 1469 (7th Cir. 1993) 21

United States v. Ruggiero, 726 F.2d 913 (2d Cir.), *cert.denied sub nom. Rabito v. United States*, 469 U.S. 831 (1984) 5

United States v. Sanders, 929 F.2d 1466 (10th Cir.), *cert.denied*, 502 U.S. 846 (1991) 5

United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982) 5, 9, 15

United States v. Tripp, 782 F.2d 38 (6th Cir.), *cert.denied*, 475 U.S. 1128 (1986) 15

United States v. Turkette, 452 U.S. 576 (1981) 9, 21, 22

United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988) 27

United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983) 5, 17 18, 22

Veazie Bank v. Fenno, 75 U.S. 533 (1869) 25

STATUTES

18 U.S.C. §201 27

18 U.S.C. §371 ..... 15, 16

18 U.S.C. §666 ..... 2, 4, 23 24, 26, 27, 29 30

18 U.S.C.§1961(1) 9, 16

18 U.S.C. §1961(4) 9

18 U.S.C. §1961(5) 9

18 U.S.C. §1962(c) ..... *passim*

18 U.S.C. §1962(d) ..... *passim*

18 U.S.C. §1964(c) 13

U.S. Const. art. I, §8 24

U.S. Const. amend. X 23, 24, 25

OTHER AUTHORITIES

Sand, Siffert, Loughlin, and Reiss, Modern Federal Jury Instructions, Volume 3 (1996), ¶ 52.04, Instruction 52-25 ..... 10, 13

Tribe, American Constitutional Law, §5-20, (2d ed. 1988) 24, 25, 27

United States Department of Justice Manual, *Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors* 18

OCTOBER TERM 1996

No. 96-738

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* *

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an

---

* Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court.

affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice, and to ensure that statutes are construed and applied consistent with their language, and in accordance with due process.

STATEMENT

Amicus adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

The court below erred in affirming petitioner Salinas's convictions under the Racketeer Influenced and Corrupt Organizations act ("RICO"), 18 U.S.C. §1962(d), and under 18 U.S.C. §666. Regarding the RICO conviction, as has been the case with many issues involving RICO, the question of what constitutes a "RICO conspiracy" has bedeviled the courts, and created a conflict among the Circuit Courts of Appeal.

Indeed, even the government, in a prior case, argued for precisely the standard petitioner seeks now, and a Department of Justice RICO Manual instructed that indictments be so drafted. Also, the Fifth Circuit itself has issued contradictory standards through the years with respect to the requirements of

a RICO conspiracy, and two Justices of this Court dissented from the denial of a petition for certiorari submitted in another case (from the Third Circuit) twelve years ago.

As detailed below, the Fifth Circuit's decision that a RICO conspiracy does not require an agreement by the defendant at issue to commit personally at least two predicate acts of racketeering, but only an agreement that predicate acts be committed by others, was fatally flawed in three respects:

(1) it sustained a jury instruction that did not even require the relaxed standard adopted by the court below. While even the court below requires an *agreement* that predicate acts be committed, albeit not by the defendant under consideration, the instruction at trial below permitted the jury to convict petitioner if he simply *knew* of the predicate acts committed by others. That cannot provide the basis for a RICO conspiracy conviction, even under the standard applied by the court below;

(2) it failed to apply the elements of the substantive offense, §1962(c), to the agreement to commit the offense. An essential element of a violation of §1962(c) is the defendant's personal commission of (at least) two predicate acts of racketeering; therefore; an agreement to violate §1962(c) necessarily requires an agreement to commit the substantive offense -- namely, an agreement to commit *personally* two such acts of racketeering. As a result, the standard adopted by the court below is completely inconsistent with the structure and elements of the RICO statute; and

(3) it ignored and undermined a series of decisions by this Court with respect to the conduct and persons punishable under the RICO statute. Those decisions, discussed below, have construed the elements of RICO — the "racketeering enterprise", the "pattern of racketeering", and the "operation or management" test — so as to ensure that persons who do not commit a "pattern of racketeering", or who do not have a sufficient relationship with the affairs of the "enterprise" are not liable under RICO. The decision below would vitiate many of the principles underlying those decisions, and allow prosecutors and plaintiffs to circumvent them at will.

Regarding, the convictions under 18 U.S.C. §666, which proscribes the bribery of state and local officials in amounts greater than $5,000, when the state or local government organization receives more than $10,000 of federal funding annually, the Court below applied the statute to circumstances in which federal funds were not at all implicated, thereby extending the statute beyond its appropriate and intended scope. In addition, to the extent the statute *does* apply to such facts, it is unconstitutional since it violates fundamental principles of federalism protected by the Tenth Amendment to the United States Constitution.

Accordingly, *amicus* respectfully submits that the decision below should be reversed with respect to both the RICO conviction and the §666 conviction, and the Indictment against petitioner be dismissed.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT A CONSPIRACY TO VIOLATE RICO DOES NOT REQUIRE PROOF THAT A DEFENDANT AGREED TO COMMIT PERSONALLY TWO PREDICATE ACTS OF RACKETEERING

The conflict among the Circuit Courts of Appeal is simple and stark: does a conspiracy to violate subsection 1962(c) of RICO require that a defendant agree to commit *personally* two predicate acts of racketeering, as the First, Second, and Tenth Circuits have held? *See United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied*, 502 U.S. 846 (1991); *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom. Rabito v. United States*, 469 U.S. 831 (1984); *United States v. Winter*, 663 F.2d 1120, 1136-38 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983). *See also Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 440 (D.D.C. 1992).

Or, as other Circuits have held, does a RICO conspiracy require only that the particular defendant merely agree that two predicate acts be committed by other members of the "racketeering enterprise"? *See, e.g., United States v. Pungitore*, 910 F.2d 1084, 1130 (3d Cir. 1990), *cert. denied*, 500 U.S. 915 (1991); *United States v. Pryba*, 900 F.2d 748, 759-60 (4th Cir. 1989), *cert. denied*, 498 U.S. 924 (1990); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); *United States v. Neapolitan*, 791 F.2d 489, 494-500 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986); *United States v. Leisure*, 844 F.2d 1347, 1367 (8th Cir. 1988); *United*

States v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993).[1]

Ironically, as the Seventh Circuit noted in *United States v. Neapolitan*, *supra*, both sides of the issue "have ground their interpretations" on the same case: *United States v. Elliott*, 571 F.2d 880, 902-03 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). 791 F.2d at 496, n. 3. According to *Neapolitan*, *Elliott* "is at once the seminal discussion of RICO conspiracy and, in many ways, the root of the current controversy." *Id.*

As detailed below, only by ignoring specific language in *Elliott* and subsequent cases have several Circuits dispensed with the RICO conspiracy's requirement of the defendant's agreement to commit personally two predicate acts of racketeering. The result, as demonstrated below, is that those decisions have been inconsistent internally and with each other, and that is particularly true for the Fifth Circuit.

As a result, examination of the elements of a violation of §1962(c), as well as review of a series of this Court's decisions interpreting RICO and its several elements, compel

---

[1] This conflict has been brewing for years and, in *Adams v. United States*, 474 U.S. 971 (1985), Justice White, joined by Chief Justice Burger, dissented from the denial of certiorari with respect to this very issue, noting that either "Congress' intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy[,]" or "defendants are being exposed to conviction for behavior Congress did not intend to reach under §1962(d)." *Id.* *Amicus* respectfully submits that the latter is accurate. Thus, while, as discussed *post*, at 6-7, petitioner's conviction should be reversed under even the Fifth Circuit's standard, it is respectfully submitted that this Court should resolve this important conflict among the Circuits.

the conclusion that the proper construction of the RICO conspiracy section, §1962(d), requires that a defendant agree to commit personally at least two predicate acts.

A. The RICO Conspiracy Jury Instruction Below Was Erroneous Even Under the Fifth Circuit's Standard

As a threshold matter, though, petitioner's RICO conspiracy conviction cannot be sustained even under the standard applied below. The trial court's instruction to the jury allowed the jury to convict petitioner if he merely *knew* of the racketeering acts committed by others, regardless whether he agreed to their commission beforehand.

The pertinent portion of the charge read as follows:

> [w]hat you are being asked to decide in [the RICO conspiracy count] is . . . if [petitioner] was only involved in one or two [predicate acts of racketeering] or even none, did he, nevertheless, *know about this pattern. Did he know that this whole pattern of activity was going on and did he then* knowingly and wilfully join in and participate and contribute in some fashion.

United States v. Marmolejo, 89 F.3d 1185, 1195, n. 16 (5th Cir. 1996) (emphasis added).

Thus, the trial court's instruction, in permitting the jury to convict absent *any* agreement by the defendant with respect

to predicate acts, was contrary to either construction of the RICO statute, which each require *some* form of prior *agreement* with respect to the predicate acts. Mere *knowledge* is insufficient under either standard, yet that may very well be the (improper) basis for petitioner's RICO conviction.

As a result, at a minimum, it is respectfully submitted that petitioner's RICO conviction should be reversed, and a new trial ordered. However, as detailed below, the further relief of reversal and dismissal are mandated by the elements of §§1962(c) & (d), and by this Court's decisions applying RICO.

B. The Pertinent Sections of RICO

There are four subsections of RICO that are critical to the process of deciding what is required for a RICO conspiracy to violate §1962(c). That subsection provides:

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Subsection 1962(d) states simply that:

> [i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection

> (a), (b), or (c) of this section.

The "pattern of racketeering activity" referred to in §1962(c) is defined in pertinent part in §1961(5) as "requir[ing] at least two acts of racketeering activity," which activity is listed among the federal and state offenses set forth generically and specifically in §1961(1). The "enterprise" referred to in §1962(c) includes, under §1961(4), "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

This Court has held that both the "pattern of racketeering" and the RICO "enterprise" are essential elements of the statute, and that they are distinct elements as well that must be proved independently. *See Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985); *United States v. Turkette*, 452 U.S. 576, 583 (1981).

C. Since a §1962(c) Violation Requires the Personal Commission of Two Predicate Acts of Racketeering, a RICO Conspiracy Requires An Agreement to Commit Personally Two Such Predicate Acts of Racketeering

The stated basis for the decision below (and for those courts it follows, *see, e.g.*, cases cited *ante* at 5-6), that a RICO conspiracy does not require the defendant to agree to commit personally two predicate acts, is that "[n]othing in this language [of §1962(d)] indicates that Congress intended to do anything more than to criminalize a conspiratorial objective — the violation of a substantive RICO provision." *United States v. Marmolejo, supra*, 89 F.3d at 1196 (citations omitted), *citing United States v. Sutherland, 656 F.2d at 1193; Neapolitan, supra*, 791 F.2d at 497.

Yet, as detailed below, since that very "violation of a substantive RICO provision[,]" requires the *personal* commission of at least two predicate acts, the "conspiratorial objective" must include an agreement to do just that. In fact, the Seventh Circuit, in *United States v. Neapolitan*, *supra*, states that very proposition in a footnote, albeit without recognizing its controlling import:

> [s]ince the predicate crimes would have to be linked to the enterprise to fall within the scope of the conspiracy's objective, requiring an agreement personally to commit those crimes would amount to a requirement of agreeing personally to commit a violation of a substantive RICO provision.

791 F.2d at 498, n. 4.

That is exactly what a conspiracy requires: the individual's agreement to violate the substantive offense. The hallmark of a conspiracy is the agreement to accomplish an illegal objective. *See Braverman v. United States*, 317 U.S. 99 (1942). It is uncontested that a violation of §1962(c) requires that a defendant "conduct or participate, directly or indirectly, in the conduct of [the RICO] enterprise's affairs through" the *personal* commission of at least two predicate acts of racketeering activity constituting a "pattern." *See* Sand, Siffert, Loughlin, and Reiss, *Modern Federal Jury Instructions*, Volume 3 (1996), at ¶ 52.04, Instruction 52-25 ("[a] defendant engages in a pattern of racketeering activity if he commits at least two racketeering acts, sufficiently related to constitute a pattern, within ten years of each other"). *See also United States*

v. Phillips, 664 F.2d 971, 1038 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

Thus, a defendant who conducts or participates in the conduct of a RICO enterprise's affairs through a pattern of racketeering activity *committed by others* has *not* violated §1962(c). Consequently, an agreement to do so — to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering committed by *others* — is *not* an illegal agreement, and therefore is not punishable under §1962(d). *See Dooley v. United Technologies Corp.*, *supra*, 803 F. Supp. at 440 (plaintiff cannot meet the "pattern of racketeering" requirement as to particular defendants "by pleading that [those] defendants agreed to the predicate acts . . . committed by other defendants"). *See also R.E. Davis Chemical Corp. v. Nalco Chemical Co.*, 757 F. Supp. 1499, 1509 (N.D. Ill. 1990).

Rather, only an agreement to violate §1962(c) — to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering committed *by the specific defendant* — can satisfy the requirements of a §1962(d) conspiracy.

In fact, in *Elliott*, *supra*, which, as noted *ante*, at 6, has been described as the progenitor of the rationale underlying both sides of this issue, the Fifth Circuit explained that

> [t]he gravamen of the [RICO] conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather *it is that each*

> *agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes.*

571 F.2d at 902 (emphasis added).[2]

Subsequently, in *United States v. Phillips*, *supra*, the Fifth Circuit repeated that standard, finding that the defendant under consideration

> could be guilty of participating in a RICO conspiracy, even though the conspiracy had the single objective of importing the 200 pound load of marijuana, so long as he *committed or agreed to commit at least two separate crimes in furtherance of the conspiracy's single objective.*

664 F.2d at 1039 (emphasis added).

The court then applied that standard, and, since it ruled that there were *not* "two separate acts which [the defendant] agreed to do in furtherance of the conspiracy to import marijuana, there was no pattern of racketeering necessary for

---

[2] In affirming the RICO conspiracy convictions in *Elliott*, the Fifth Circuit relied on that standard, noting that "[w]here, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." 571 F.2d at 903.

conviction in a RICO conspiracy[,]" it reversed the defendant's RICO conspiracy conviction. *Id. See also United States v. Martino*, 648 F.2d 367, 400 (5th Cir. 1981) (RICO conspiracy reversed because, as to one defendant, second predicate act committed by defendant was not charged in the Indictment).

The courts that have ruled otherwise, including the court below, have ignored that language in *Elliott* and *Phillips*, and eliminated the requirement that the defendant agree to commit personally two predicate acts of racketeering by simply noting that the language of §1962(c) does not require an agreement to commit personally the "pattern of racketeering activity". *See, e.g., Neapolitan*, 791 F.2d at 496 ("Congress did not explicitly impose through the language of the statute any requirement of agreement personally to commit two predicate acts").

However, that begs the question, since it is undisputed that its absence from the explicit language of §1962(c) notwithstanding, a substantive violation of §1962(c) requires that *the specific defendant* commit two predicate offenses constituting a "pattern of racketeering activity." *See* Sand, Siffert, Loughlin, and Reiss, *Modern Federal Jury Instructions*, Volume 3 (1996), at ¶ 52.04, Instruction 52-25, *supra; United States v. Leisure*, *supra*, 844 F.2d at 1367; *United States v. Phillips*, *supra*, 564 F.2d at 1038.[3]

---

[3] In addition, as this Court's prior decisions addressing RICO demonstrate, the statute's provisions often require definition and clarification beyond what is expressly set forth therein. *See, e.g., Reves v. Ernst & Young*, 507 U.S. 170 (1993) [meaning of "conduct and participate . . . in the conduct of such enterprise's affairs" in §1962(c))]; *Holmes v. S.I.P.C.*, 503 U.S. 258 (1992) [meaning of "by reason of" in §1964(c) in determining standing to sue]; *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 429 (1989)

The courts that have not required that a defendant agree to commit personally two predicate acts have not come to grips with the clear requirements of §1962(c), and how they are inextricably linked with §1962(d) conspiracies to violate §1962(c). Nor have those courts addressed the undeniable fact that §1962(c) requires the personal commission of two predicate acts even though the statute does not explicitly say so.

As a result, mere recitation of the language of §1962(c) does not support the contention that a RICO conspiracy can be established without proof of the particular defendant's agreement to commit personally two predicate offenses. In *United States v. Phillips*, *supra*, the Fifth Circuit recognized that connection, and, in affirming the district court's dismissal of the substantive RICO charge because the two predicate acts charged against the defendant merged into only one offense, remarked that "the district court did not discuss or explain why it did not [also] dismiss the conviction for conspiring to engage in a pattern of racketeering." 664 F.2d at 1038.

The misapplication of RICO by the court below, and concurrent misapprehension of a violation of §1962(c), are made clear from further review of the decision below, as well as of the decisions of the Circuits with which it concurred. For example, the court below asserts that "[t]o be guilty of a RICO violation, one must have violated other laws in a way that implicates RICO." 89 F.3d at 1197, *citing Neapolitan*, *supra*, 791 F.2d at 497 (quotation omitted). But it is the *personal* commission of predicate acts by the defendant, not by others, that establishes that defendant's "violation of other laws." By deleting that requirement, and permitting conviction for a RICO conspiracy without first requiring the defendant's agreement to

---

[meaning of "pattern of racketeering activity" in §1961(5)].

commit personally the predicate acts -- which is the requisite "violation of other laws" in a RICO conspiracy charge -- the court below allows a RICO conspiracy conviction based on "violations of other laws" by persons other than the defendant.[4]

In addition, in finding conspiratorial liability without petitioner's agreement to commit personally two RICO "predicate acts," the court below mistakenly treated RICO "predicate acts" that comprise §1962(c)'s "pattern of racketeering activity" as *overt* acts essential to a conspiracy charged under 18 U.S.C. §371. 89 F.3d at 1196 ("to prove a RICO conspiracy, 'no actual acts of racketeering need occur; there need only exist a conspiracy to perform the necessary acts plus some overt action by one of the conspirators in furtherance of the conspiracy'"); *Sutherland*, *supra*, 656 F.2d at 1187.[5]

---

[4] Since a §1962(c) allegation can include conspiracies as predicate acts, if a defendant agrees with another defendant that one of them will commit a particular predicate act, the non-acting defendant can be liable for that predicate act if it is charged as a conspiracy in the indictment, and the non-acting defendant is named in that predicate act. *See United States v. Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). That, however, was not the case here.

[5] Some courts, including the Second Circuit, which for a RICO conspiracy requires the defendant's agreement to commit personally at least two predicate acts, have held that a RICO conspiracy may not even require an overt act. *See, e.g.*, *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986) (RICO conspiracy "does not require proof of an overt act"); *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983); *United States v. Barton*, 647 F.2d 224, 237 (2d Cir.), *cert. denied*, 454 U.S. 857

RICO predicate acts, however, are surely not overt acts, as the distinctions are clear and dispositive:

- in a §371 conspiracy, at least one overt act must be committed, while not a single predicate act need be accomplished in a RICO conspiracy (the defendant need only agree to commit at least two);

- an overt act can be committed by any member of a §371 conspiracy, while a defendant must personally commit two predicate acts (that form a pattern) in order to commit a substantive violation of §1962(c);

- an overt act need not constitute a crime, while a predicate act must be an offense denominated in §1961(1);

- one overt act is sufficient for a §371 conspiracy, while two predicate acts are required for a substantive RICO or a RICO conspiracy.

Moreover, §1962(c) is *not* a conspiracy offense. Thus, the predicate acts are not overt acts. Instead, the "predicate acts" constitute an element of RICO that cannot be satisfied by *another* defendant's commission of predicate offenses.

The court below's confusion is understandable, considering the thorny issues RICO regularly presents to the courts. In fact, other courts have been similarly vexed by the same analytical defects. In *United States v. Carter*, 721 F.2d 1514 (11th Cir.), *cert. denied sub nom., Morris v. United States*,

---

(1981).

469 U.S. 819 (1984), the Eleventh Circuit attempted to distinguish *Phillips*, *supra*, as follows:

> [a]s in *Phillips*, when a defendant's agreement does not include the objective of a RICO conspiracy, he must further agree to personally commit two predicate acts in order for RICO to apply. However, when a defendant agrees to become a member of a conspiracy with the essential RICO objective, further proof that the defendant agreed to *personally* commit two predicate acts is not required.

721 F.2d at 15310-31 (emphasis in original).

That unnecessarily convoluted and unworkable doctrine would present to a jury alternative definitions of conspiracy in the RICO context, which the court justified by stating that RICO "expanded traditional conspiracy law". 721 F.2d at 1530. Nevertheless, the Seventh Circuit, in *Neapolitan*, *supra*, placed its primary reliance on *Carter* even though in *Neapolitan* the court concluded that §1962(d) "does not mandate a new concept of conspiracy[.]" 791 F.2d at 497.

That inconsistency in the approach to RICO conspiracy jurisprudence is not confined to the courts. Indeed, extraordinarily, in *United States v. Winter*, *supra*, a full decade after RICO was enacted, the *government* urged the very position petitioner assumes here, that

> a RICO conspiracy be

> established by proof that each defendant agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity.

663 F.2d at 1136. *See also Adams v. United States*, *supra*, 474 U.S. at 971.

Moreover, even five years later, in 1985, a United States Department of Justice Manual entitled *Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors*, instructed that "[a]s of mid-1985, it is the policy of the Organized Crime and Racketeering Section that every defendant in a proposed RICO conspiracy count must be shown to have agreed personally to commit two or more racketeering acts." *See Neapolitan*, *supra*, 791 F.2d at 494-95.

In fact, the Indictment charged the RICO conspiracy in that very fashion, and in that light, the proof was plainly insufficient. Indeed, this case provides a vivid illustration why RICO conspiracy liability must be grounded in the defendant's agreement to commit personally at least two predicate acts. Petitioner was found guilty of a RICO conspiracy even though the jury found he committed only one predicate, and it may very well have found that he agreed to commit but one predicate act.

D. Not Requiring a Defendant's Agreement to Personally Commit the Predicate Offenses Undermines a Series of This Court's Decisions Interpreting RICO

The court below reached its decision with respect to liability under §§1962(c) & (d) without reference to a series of this Court's decisions applying and interpreting RICO. Yet the

court below's holding seriously undermines this Court's decisions with respect to the elements of a RICO violation.

1. The "Pattern of Racketeering" Element

For example, in *H.J. Inc. v. Northwestern Bell Telephone Company*, 429 U.S. 229 (1989), this Court held that a "pattern of racketeering activity" required proof that "the racketeering predicates are related, *and* that they amount to or pose a threat of continuing criminal activity." 492 U.S. at 239 (emphasis in original).

For purposes of substantive §1962(c) charges, an individual defendant's alleged "pattern of racketeering activity" is evaluated with reference only to those predicate acts charged against him. As a result, in the RICO conspiracy context, allowing the predicate acts of *others* to be included in the "pattern" equation effectively vitiates the limits *H.J. Inc.* imposed on a "pattern" and RICO liability for an individual defendant.

It would also deprive a reviewing court of knowledge of which predicate acts the jury relied upon in finding a pattern for a particular defendant, since the verdict sheet, like that used here, would not indicate what predicate acts a jury considered against a defendant not charged in those predicate acts.

In fact, in this case, in view of petitioner's acquittal (via Rule 29 and the jury's verdict) on two of the three predicate acts, it is likely that the jury found the pattern based on the predicate acts charged solely against petitioner's co-defendant. Yet it is impossible now to determine whether that "pattern" was sufficient, since there is not any indication which predicate acts were so considered.

2. *The "Operation or Management" Element*

In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), this Court held that a defendant is not liable under §1962(c) unless he "participated in the operation or management of the enterprise itself." 507 U.S. at 180. In so doing, this Court defined "participate", as it appears in §1962(c), to mean "to take part in[,]" 507 U.S. at 177 (citation omitted), and rejected the argument that "almost any involvement in the affairs of an enterprise would satisfy the 'conduct or participate' requirement[]" of §1962(c). *Id.*

The court below's decision runs afoul of *Reves* because if RICO conspiracy liability can be predicated on racketeering acts committed by others, then non-actors and outsiders of the type *Reves* excluded from substantive liability under §1962(c) will be ensnared within §1962(d) if they merely agree that others should commit predicate acts.

The irreconcilable conflict between the decision below and the *Reves* "operation or management" test is illustrated by a passage from *United States v. Elliott*, *supra*, which decision, as noted *ante* at 6, has been used to uphold RICO conspiracy convictions that did not require a defendant's agreement to commit personally two predicate offenses. In affirming the RICO conspiracy convictions, the court in *Elliott* held that RICO applied to "insiders *and outsiders[,]*" including "those peripherally involved with the enterprise." 571 F.2d at 903 (emphasis in original). That interpretation cannot co-exist with *Reves*, yet the decision below here will allow it to flourish.

Since the penalties for a RICO conspiracy are the same as they are for a substantive RICO offense — in both civil and criminal RICO actions — *Reves* will fail to provide protection for those persons and entities this Court has held are not subject

to RICO liability. *See, e.g., United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993) (holding that *Reves* "operation or management" test does not apply to a RICO conspiracy charge).

Indeed, under the interpretation offered by the court below, plaintiffs and prosecutors will be encouraged to rely solely on RICO conspiracy and eschew the substantive claims so as to avoid the need to prove each defendant's personal involvement, either by agreement or commission, in the requisite predicate offenses. Thus, RICO conspiracy will have swallowed the statute, and created liability for persons who have not committed, or agreed to commit, a single predicate offense.[6]

3. *The "Enterprise" Element Independent of the "Pattern of Racketeering Activity"*

In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that "the 'enterprise' is not the 'pattern of

---

[6] The concept of limiting RICO liability to those acts for which a defendant is *personally* responsible is also reflected in this Court's decision in *Holmes v. S.I.P.C.*, *supra*, in which, in limiting standing to sue under RICO to those plaintiffs whose injuries were proximately caused by the defendant's conduct, this Court stated:

> [h]ere we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts.

503 U.S. at 268.

racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." 452 U.S. at 583. This Court also explained that "[w]hile the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other." *Id.*

The court below's construction of the RICO statute will eliminate the careful distinction *Turkette* drew between the "enterprise" and the "pattern of racketeering activity". For purposes of a RICO conspiracy, proof of the "enterprise" and a defendant's employment by or association with it will be, effectively, all that is necessary to establish RICO conspiracy liability, since the inference of an "agreement" that others will commit predicate offenses will flow inexorably from the mere membership in the "enterprise".

In *United States v. Winter*, *supra*, the First Circuit recognized this danger in holding that a RICO conspiracy required proof that the individual defendant agreed to commit personally the requisite predicate acts:

> [r]equiring one to knowingly join an enterprise and agree to commit two or more predicate crimes provides sufficient protection to those who might otherwise be convicted through guilt by association.

663 F.2d at 1136.

That "guilt by association" — in the RICO context, the mere membership in an "enterprise" — constitutes a "status crime", which is impermissible. *See Robinson v. California*, 370 U.S. 660 (1962). Yet it is precisely what the Court below's

decision promotes for a statute that provides for severe sanctions in terms of imprisonment, forfeiture, and civil damages.[7]

Accordingly, it is respectfully submitted that the only way to preserve the meaning of RICO, and of §1962(c) in particular, that this Court has explicated in its decisions is to reverse the decision of the court below, and adopt the construction employed by the First, Second, and Tenth Circuits: that RICO conspiracy liability requires that the individual defendant agree to commit personally two or more predicate acts of racketeering.

II. AS APPLIED IN THIS CASE, 18 U.S.C. §666 IS AN UNCONSTITUTIONAL INTRUSION INTO LOCAL MATTERS, IN VIOLATION OF PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND INHERENT IN THE STRUCTURE OF THE CONSTITUTION

It is respectfully submitted that for the reasons set forth in petitioner's Brief, and in both *United States v. Foley*, 73 F.3d 484 (2d Cir. 1996) and *United States v. Frega*, 933 F. Supp. 1536 (S.D. Cal. 1996), §666 does not apply to this case, in which the integrity of federal funds was not implicated. However, if §666 does, in fact, apply to the circumstances of this case, the statute is unconstitutional as applied.

---

[7] While the court below also relies on RICO's "liberal construction" clause, 89 F.3d at 1197, this Court long ago put to rest the notion that "anything goes" with respect to an expansive approach to RICO actions. *See, e.g., Reves v. Ernst & Young*, *supra*; *Holmes v. S.I.P.C.*, *supra*; *H.J., Inc. v. Northwestern Bell Telephone Company*, *supra*.

This case raises an important constitutional issue: by "federalizing" local prisons and prison officials and employees due to the acceptance of more than $10,000 in federal money, does §666 violate fundamental principles of federalism protected by the Tenth Amendment and "the tacit postulates of the Constitution as a whole" [Tribe, *American Constitutional Law* §5-20, p. 379 (2d ed. 1988) ("Tribe"), *citing Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., *dissenting*)], when the statute reaches conduct having nothing to do with the federal funds?[8]

The statute under which petitioner was convicted purports to exert federal control over federal funds disbursed by Congress, but in operation establishes a general police power in the government over a wide range of purely local activity. This case is a perfect example, since the activity prosecuted was unrelated to the integrity of the federal funds the local prison received pursuant to contract. As a result, the invocation of §666 in this case exceeded the proper role of the national government in a federal system.

The Constitution empowers Congress to "pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, §8. All powers not expressly delegated to Congress "are reserved to the States, respectively, or to the people." U.S. Const. amend. X. Because Congress's spending power is not broad enough to permit federal regulation through the criminal law of wholly local conduct unrelated to federal funds, §666 violates the Tenth Amendment, at least as applied in this case.

Moreover, whether or not §666 exceeds Congress's

---

[8] While many circuit cases have interpreted the statute, none have considered its constitutionality.

spending power, in this case the statute intruded so deeply into matters of such local concern with such little justification that its application here violated principles of federalism inherent in the structure of the Constitution itself, wholly apart from any particular textual language. *See* Tribe at §5-20, pp. 378-85.[8] Because the Constitution "presuppose[s] the existence of the states as entities independent of the national government," with their own spheres of authority and activity,

> [c]ongressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the

---

[8] Professor Tribe supports his point — i.e., that a particular statute can violate fundamental principles of federalism without violating particular textual language of the constitution — with, *inter alia*, *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975), in which the Court wrote that "[p]etitioners have stated their argument, *not in terms of the Commerce power*, but in terms of *the limitations on that power* imposed by the Tenth Amendment...The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States's integrity or their ability to function effectively in a federal system." (Emphasis added). *See also Veazie Bank v. Fenno*, 75 U.S. 533, 541 (1869).

> *structural assumptions and the tacit postulates* of the Constitution as a whole.

Tribe at §5-20, p. 379 (emphasis added).

This Court has recently recognized that federal interests are circumscribed in those areas in which the states "historically have been sovereign" [*United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1632 (1995) (holding unconstitutional on commerce clause grounds federal statute prohibiting schoolyard possession of gun)]. This Court has also previously held that local prison administration is presumptively the province of state and local authorities. *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 126 (1977), *citing Procunier v. Martinez*, 405 U.S. 319, 321 (1972) (other citations omitted).

Here, the federal government unjustifiably invaded that sovereignty by invoking a statute that apparently permitted prosecution not only for entirely local conduct, but conduct that did not directly implicate federal funds at all. If §666 permitted the government's intrusion in this case, it violates fundamental principles of federalism.[9]

Certainly that is far afield of §666's intended purpose. The statute was enacted to protect federal funds administered directly through federal programs, since it was unclear at the

---

[9] Like the statute invalidated in *Lopez*, §666 "contains no jurisdictional element which would ensure, through case-by-case inquiry, " that the charged conduct had an effect on the federal interest the statute seeks to protect. 115 S. Ct. at 1631. The $10,000 (funding) and $5,000 (value of the bribe) thresholds are not meaningful, considering the encompassing extent of current federal funding.

time whether 18 U.S.C. §201, the pre-existing federal bribery statute, reached the proscribed conduct once title to the funds was transferred to the program recipients. *See United States v. Foley*, *supra*, 73 F.3d at 489-90.

Notwithstanding that origin, the Circuit Courts have interpreted §666 as not requiring any link between the corrupt conduct and the federal benefits received by the affected agency. *See United States v. Coyne*, 4 F.3d 100, 108-10 (2d Cir. 1993); *United States v. Westmoreland*, 841 F.2d 572, 574-78 (5th Cir. 1988). The courts have found that through §666, "Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them." *Westmoreland*, 841 F. 2d at 578. In other words, Congress apparently intended to permit the federal government to regulate all of the affairs of a local agency even when federal money is nowhere in sight.

That rationale, however, is subject to constitutional limits because federal funds are found now in every nook and cranny of society. Just as a Congressional finding that interstate commerce is affected "does not necessarily make it so[,]" *see Lopez*, *supra*, ___ U.S. at ___, 115 S. Ct. at 15, n. 2, this Court, and not Congress, has the last word as to how far federal jurisdiction can be extended under the guise of protecting federal funds.

In this instance, §666 has gone too far. *See United States v. Frega*, *supra*, 933 F. Supp. at 1540 (indictment charging §666 violation dismissed because the statute "upset[s] the balance of power between the federal and state governments"). This §666 prosecution represents an impermissible use of Congress's power to allocate federal tax dollars. The Spending Clause "confers only a power to spend; it confers no independent power to regulate." Tribe at §5-10, p.

322 [*citing United States v. Butler*, 297 U.S. 1, 62-78 (1936)]; *see also Linder v. United States*, 268 U.S. 5, 17-18 (1925). Consequently, when it provides funds to a local agency like a jail, Congress is constitutionally permitted to establish protections for those funds, but not to insinuate itself into any and all conduct committed in the local jail, as it did in this case.[10]

Punishing as federal felons local jail employees who come nowhere near federal funds (and probably did not know the jail's funding sources), and those who deal with such employees, is simply too attenuated from the purpose of §666 — protecting federal funds — to pass muster as a proper exercise of the spending power.

Certainly, an indirect threat to the integrity of federal funds can provide a basis for an exercise of Congress's

---

[10] In an analogous context, the Supreme Court has held that while Congress may exercise its spending power to prohibit a recipient of federal funds from using those funds for particular purposes, the Spending Clause does not allow Congress to regulate the constitutionally protected activities a recipient organization undertakes with funds derived from other sources. *See Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (funding provisions which "place [] a condition on the *recipient* of the subsidy rather than on a particular program or service" are unconstitutional) (emphasis in original); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 399-401 (1984). Just as the activities engaged in by an organization are beyond the regulatory reach of Congress when federal funds are not used to finance those activities, so too is conduct that affects a local agency beyond the federal government's criminal jurisdiction when federal funds are not touched by that conduct

Spending Clause jurisdiction.[11] In petitioner's case, however, the connection between the charged conduct and federal funds was non-existent. To the extent petitioner's conduct comes within the coverage of the statute despite the lack of any nexus between his conduct and a legitimate federal interest, the statute offends constitutional principles of federalism.

Because §666 purports to reach purely local conduct having no connection with federal funds, it lacks such a jurisdictional basis, and is therefore unconstitutional as applied here. Accordingly, it is respectfully submitted that petitioner's conviction should be reversed.

---

[11] *See, e.g., United States v. Dransfield*, 913 F. Supp. 702, 707-11 (E.D.N.Y.), *aff'd*, 104 F.3d 350 (2d Cir. 1996) (§666 reaches corrupt conduct affecting federal funds directly administered by local agency).

CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that petitioner's convictions for RICO conspiracy, and for violating 18 U.S.C. §666, should be reversed.

Dated: 10 April 1997
New York, New York

Respectfully submitted,

JOSHUA L. DRATEL
(*Counsel of Record*)
JOSHUA L. DRATEL, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707

RICHARD A. GREENBERG
NEWMAN & SCHWARTZ
950 Third Avenue
32nd Floor
New York, New York 10017
(212) 308-7900

Counsel for Amicus
National Association of
Criminal Defense Lawyers

Of Counsel

Lisa Kemler
Zwerling & Kemler, P.C.